A key difference among competing providers of local telecommunications services is the obligation to serve. ILECs have an obligation to serve any and all customers in their serving area (even where the ILEC may not currently have facilities in place); CLECs typically do not.[54] For example, in California, CLECs have no obligation to deploy facilities in order to serve any potential customer. In California, CLECs "are *authorized* to provide service in the areas in which they are designated to serve, but are not *obligated* to provide facilities-based service more than 300 feet from the area abutting the [CLEC's] facilities" (emphasis in original).[55] In fact, there are a number of instances where building owners have solicited service from CLECs only to be told that "we don't go there."[56] If a tenant wants service from an ILEC, in contrast, the ILEC is legally obligated to provide it, and the building owner must permit it. Further, a building owner accepts some risk when contracting with a new, unknown provider and may require different compensation for that risk.

Discrimination may also be reasonable and appropriate if the customers (in this case, telecommunications carriers) are not similarly situated.[57] The Commission has recognized this in other contexts within its jurisdiction. For example, when the FCC investigated AT&T's Tariff 12 offerings in response to allegations of discriminatory pricing, the Commission analyzed whether the Tariff 12 packages where "like" the individually tariffed services contained in a Tariff 12 package such as SDN ("Software Defined Network"). The FCC found

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[54] There are other differences between ILECs and CLECs (*e.g.*, universal service support and requirements to offer averaged rates) which support our view that they are more unlike than like from a regulatory perspective. It is difficult for us to see how the Commission finds the arguments for symmetrical building access so compelling when it has so far failed to achieve symmetry in other aspects of its regulatory treatment of ILECs and CLECs.

[55] Decision 95-07-054, before the California Public Utilities Commission of the State of California, *Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service*, R.95-04-043 (Filed April 26, 1995); *Order Instituting Investigation on the Commission's Own Motion into Competition for Local Exchange Service*, I.95-04-044 (filed April 26, 1995), July 24, 1995, at 24.

[56] About 13 percent of the respondents to the Alliance Survey said that they were denied service by a competitive telecommunications provider. Respondents were given reasons such as: building is too small; area not served; and company did not have facilities in place.

[57] Scherer, at 514.

that Tariff 12 packages were not like the individual services offered because Tariff 12 integrated service offerings and added "turnkey" and network monitoring features.[58]

Some of the petitioners have suggested that exclusive contracts are *per se* discriminatory. We disagree. In the first place, it is difficult to accept this argument when some CLECs have themselves *sought* exclusivity.[59] Second, requiring an exclusive arrangement may not be unreasonable discrimination if the arrangement is offered to all CLECs (for example, by auctioning off a slot of a building roof). Third, exclusive contracts may actually promote competition by giving new entrants some assurance of a revenue stream (or the chance or create one) to cover the costs of their investment in connecting to a particular building.[60]

The Notice does not propose or seek data on what would constitute just and reasonable rates and conditions for access to facilities controlled by building owners/managers.[61] Lack of such information and analysis will lead to poor economic policy. How is the FCC to determine a standard for "just compensation" when there are about one million heterogeneous buildings located throughout the country? How will the Commission identify the costs associated with access (as opposed to other costs)? Further, the Commission has not defined the elements of building access that it would propose are necessary for CLECs to serve tenants. Overlaying public-utility-style regulation on building owners is an order of magnitude more difficult than imposing it on cable systems (an exercise which, although mandated by Congress, was viewed by most observers as a futile, if not embarrassing, effort on the part of the Commission).[62]

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[58] In the Matter of AT&T Communications Revision to Tariff FCC No. 12, CC Docket No. 87-568, *Memorandum Opinion and Order on Remand*, released November 22, 1991. *See also* In the Matter of Competition in the Interexchange Marketplace, CC Docket No. 90-132, *Report and Order*, released September 16, 1991.

[59] About 16 percent of the respondents to the Alliance Survey said that all of the competitive carriers that contacted them requested exclusive access. We note that the FCC almost certainly has the authority to prohibit CLECs from seeking (or signing) exclusive deals. If there is a problem with exclusivity, this may be the way to solve it (as opposed to regulating building owners).

[60] The FCC acknowledges this possibility. *See* Notice, at ¶ 61.

[61] The FCC recognizes that the Fifth Amendment to the U.S. Constitution requires "just compensation." Notice, at ¶ 58.

[62] *See, for example*, Thomas W. Hazlett and Matthew L. Spitzer, "How Cable TV Rate Controls Backfired," *Consumers' Research Magazine*, January 11, 1998, at 15.

(continued...)

This suggests another problem for the Commission; that of asymmetric information. The remedies sought pose substantial enforcement difficulties. The "market" consists of many buildings that are quite different in terms of age, location, available space (on rooftops and in risers), local zoning regulations, dimensions (*e.g.*, height), aesthetics, and types of tenants and needs. This makes a "one-size-fits-all" rule highly problematic. The Commission clearly lacks the resources to enforce such a rule on a case-by-case basis and can certainly find other more important tasks on which to concentrate its enforcement efforts.

While the FCC engages in legal and Constitutional analysis related to its intent to impose forced access on building owners,[63] it needs to focus more on the threshold issue of whether there is, in fact, an economically remediable market failure. The Notice in this proceeding does not provide any guidance as to what constitutes unreasonable discrimination or objectively seek to determine whether such discrimination is indeed occurring. The FCC has reached what seems to be a foregone conclusion that it must take action.[64] Mere assertions, such as those by a WinStar executive, that unreasonable discrimination has occurred should not be dispositive, particularly if the FCC cannot independently confirm the extent of alleged abuses.

The FCC dedicates few words to consideration of the appropriateness of its proposed policy and its economic impact on private property owners.[65] For example, the FCC simply asks whether its nondiscrimination requirement is "sound policy"[66] and whether it should "limit

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(...continued)

> In fact, the persistent attempts by government to control the rates charged by cable television monopolies have led to frustrating failure, both in the execution of government regulation and in intelligently addressing market realities in the public debate over cable controls. While political authorities seize on the seemingly direct approach of using federal authority to squeeze rates charged by noncompetitive cable systems, the complexity of real-world markets leads, as usual, to unintended consequences.

So now, the FCC is considering regulating the competitive real estate industry?

[63] Notice, at ¶¶ 52-60.

[64] This Notice does not even suggest that the FCC has reached "tentative conclusions." This Notice lacks the typical preliminary analysis and a request for comment on its analysis and conclusions from interested parties.

[65] *See* Appendix, *Initial Regulatory Flexibility Analysis*, where questions are raised regarding the impact on small businesses, but not the industry at large.

[66] Notice, at ¶ 61.

the scope of any obligation in order to avoid imposing unreasonable regulatory burdens on building owners."[67] The FCC's forced access proposal will affect *all* owners and managers of the almost one million buildings throughout the United States as well as all of their tenants. Forced access, along the lines apparently contemplated by the FCC will create costs that will ultimately raise rental rates for millions of tenants across the country. Yet there is every indication that building owners/managers are properly compelled by the market to reach agreements with competitive telecommunications providers to the benefit of all parties involved, including tenants. Evidence presented by the Alliance Survey clearly demonstrates that the real estate industry has responded to such needs of its tenants.

The FCC has not analyzed the benefits of its forced access proposal in the context of the impact upon societal welfare. In this proceeding, the FCC seeks to benefit a few firms at a substantial cost to society as a whole.

When government crosses the line described by Dr. Kahn earlier in this paper, without good cause, the integrity of the marketplace can be impaired and general welfare reduced. Forced access would result in outcomes less efficient than those which the market would yield. If building owners were compelled to supply access to valuable inputs on terms and conditions below those at which they would otherwise be voluntarily willing to make such access available, they are being compelled to effectively subsidize the business activities of others, *viz.*, CLECs. Further, a "one-size-fits-all" rule developed by Federal regulators would seem to preclude creative solutions such as those developed for 55 Broad Street and the Newport Financial Center.

The FCC takes great pains to build a record to establish its legal footing while seemingly taking for granted that its proposals embody sound economic policy. In our view, this is an unwise course. In performing the economic analysis that is lacking in this proceeding to date, the FCC should seriously consider whether the interests of petitioners are necessarily coincident with the interests of consumers.

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[67] Notice, at ¶ 62.

VII. Summary and Conclusions

Our analysis shows that forced access to buildings is not essential to promoting local telecommunications competition. The FCC's proposal is effectively an application of the essential facilities concept, normally used in a public utility or antitrust setting, to a competitive, unregulated market. The market is, in fact, working. Local competition is thriving. CLECs have access to capital and are getting access to buildings. Given the abundance of supply alternatives in the commercial real estate market that we observed and the substantial flexibility with which tenants can exploit the existence of those competitive alternatives, one would be hard-pressed to posit the existence of any meaningful competitive market failures in the commercial real estate industry.

The FCC should not adopt regulatory policies with broad economic impact on unregulated industries for the benefit of a few firms. These firms' "evidence" is not dispositive that unreasonable discrimination is indeed taking place. The FCC should resist accepting those self-serving claims without any independent analysis or consideration of whether widespread discrimination is actually occurring and whether any discrimination that is alleged to have occurred is unreasonable. The Notice cites no such analysis. While the FCC has taken great pains to discuss its legal authority to take action, the FCC has not yet established an economic rationale for action on its part.

The Notice also lacks any consideration of the impact of its proposals on the economy generally. Every building owner/manager in the country and all of their tenants stand to be affected by the FCC's proposed forced access policy. In our opinion, for those reasons, FCC intervention in the competitive commercial real estate market is unwarranted and is likely to be counterproductive.

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CONSTITUTIONAL ANALYSIS OF THE FCC'S NOTICE OF PROPOSED RULEMAKING, FCC 99-141

August 27, 1999

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APPENDIX

EXECUTIVE SUMMARY

The NPRM proposes a number of rules that, if promulgated, would take the private property of building owners without providing them just compensation. While these rules vary in the nature and extent of the uncompensated taking they would effect, all of them share the characteristic of requiring building owners to acquiesce to the presence of an uninvited person on their private property. The Supreme Court's decisions under the Takings Clause of the Fifth Amendment of the Constitution leave no doubt that such forced access rules automatically constitute a taking of property requiring just compensation.

The Supreme Court's decision in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), established that a law authorizing a telecommunications carrier to effect a permanent physical occupation of private property constituted a *per se* taking of private property under the Takings Clause. The decision, which dealt specifically with the installation of cable wiring on top of a building, left no doubt that such an invasion of real property always effects a taking, regardless of how small the physical occupation may be in relation to the remainder of the owner's estate.

It is an equally central tenet of eminent domain law that property rights are defined not by the Takings Clause or by any particular regulatory regime, but

rather by existing rules or understandings that stem from an independent source such as state law. The significance of this central principle is that the FCC is not free to restrict a property owner's rights simply by making general findings or conclusions as to the extent of what a landowner's property interests should be in light of the FCC's regulatory goals, but rather must respect whatever property rights are recognized under local law—such as the right to grant limited access only to specific telecommunications providers, or the right to enter into leases with restrictive covenants—and may not infringe upon those rights without implicating the Takings Clause.

Accordingly, if it is clear under relevant property law that a landowner has the right to exclude new telecommunications providers from his property, then, notwithstanding the existence of a grant to an incumbent provider, the FCC cannot require the landowner to provide nondiscriminatory access to all other providers, at least not without providing just compensation for the property interest being taken. There is no authority for the proposition that a property owner can be forced to provide nondiscriminatory access without implicating the Takings Clause, and the decision in *Loretto* plainly dictates that such a nondiscriminatory access provision would constitute a *per se* taking of property. The same result applies in the case where a telecommunications provider who has obtained a limited access license from a landowner is required to allow other providers to "piggyback" on his access rights, or in the case where a landlord has

entered into a lease that prohibits tenants from installing certain telecommunications equipment on their balconies. In both instances, so long as it is clear under local property law that the landowner has retained the right to exclude other providers or to prohibit the installation of certain equipment, the FCC cannot infringe on those rights by mandating physical access without creating a *per se* taking under the holding in *Loretto*.

In addition to creating a *Loretto* taking, the NPRM's proposals also would be found to constitute a taking of property if analyzed under the balancing test applied to non-*per se*, regulatory takings. Building owners have a reasonable, investment-backed expectation that they have the right to control and manage the delivery of telecommunications services to their tenants, and have every incentive to actively engage in the performance of this function so as to attract and retain tenants (or, as they are increasingly called, "customers"). For this reason, the FCC cannot promote the interests of the telecommunications industry over those of the real estate industry without running afoul of the regulatory takings doctrine, which seeks to prevent the government from unfairly benefiting one interest group over another.

The Telecommunications Act of 1996 does not provide the FCC with the authority to exercise the power of eminent domain, and there is ample Supreme Court precedent holding that such a power cannot be inferred from a statute that in no way gives an agency the power to effect takings. For this reason, the

Commission cannot rely solely on its general jurisdiction to enforce the Telecommunications Act in order to implement the rules in the NPRM that would effect takings of the private property of real property owners.

This result is underscored by the fact that, although the promulgation of the NPRM's proposals would create the largest liability for the government ever triggered under the Takings Clause, Congress gave no indication in the Telecommunications Act that an award of just compensation to real property owners was required or expected. Indeed, although this legislation was enacted after the D.C. Circuit held that the Commission did not have authority to issue collocation rules that would constitute a taking of the property of incumbent carriers, there is nevertheless nothing in the statute that could plausibly authorize the Commission to take property from, and then pay just compensation to, owners of real estate. While the rate-making measures in the act may lead to a different conclusion with respect to the authority to take property from incumbent carriers, the Commission has no similar ability to compensate landowners.

I. INTRODUCTION

In its Notice of Proposed Rulemaking, FCC 99-141 ("NPRM"), the Federal Communications Commission ("Commission") seeks comment on a number of rules that would significantly impact the rights of property owners. This submission,[1] attached as an exhibit to comments submitted by the "Real Access Alliance," analyzes the extent to which the NPRM implicates the Takings Clause of the Fifth Amendment.

The most far reaching of the NPRM's proposals would require building owners to provide access to their premises to all telecommunications providers on a nondiscriminatory basis. Other proposals include requiring local exchange companies ("LECs") and other public utilities to make their in-building facilities available to cable companies and telecommunications providers on nondiscriminatory terms, and extending the rule prohibiting restrictions against tenants installing antennas for video services to cover antennas for non-video services as well.

Underlying the policy proposals contained in the NPRM is the attempt to improve the access rights of all telecommunications providers to residents or businesses located in multiple tenant environments.[2] In this effort, which is

[1] This submission was prepared by COOPER, CARVIN & ROSENTHAL, but is submitted by the entire Real Access Alliance, including two specific property owners who have attached their own declarations to this exhibit.

[2] *See* NPRM, ¶ 29.

intended to enhance the level of competition and the availability of competitive services, the Commission would override and undervalue the property rights of the owners of the multiple tenant environments. In a number of specific instances, the Commission's proposals would violate the constitutional rights of these owners by taking their property without payment of just compensation. Moreover, the government's liability to pay just compensation that would be triggered by the proposals would almost certainly exceed any amount ever previously awarded under the Takings Clause. Because Congress did not grant the Commission statutory authority to exercise eminent domain powers with respect to real estate owners nor to effectively appropriate the substantial public funds required to pay just compensation, the Commission must limit the extent of its proposal so as not to raise the constitutional concerns described herein.

In order to analyze the manner in which the Commission's proposals overstep the Commission's authority, we first consider how the proposals will effect a taking of private property within the meaning of the Fifth Amendment of the Constitution.

II. THE COMMISSION'S PROPOSALS WOULD LEAD TO THE TAKING OF THE PRIVATE PROPERTY OF BUILDING OWNERS WITHIN THE MEANING OF THE FIFTH AMENDMENT

The Fifth Amendment of the United States Constitution provides that "No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use without just compensation." U.S.

CONST., Amendment V. Based on the fundamental principle that some property owners should not be required "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States*, 364 U.S. 40, 49 (1960), the Takings Clause has matured into a robust protection of private property rights against a range of government actions and regulations. In particular, the Takings Clause provides an absolute protection whenever the government appropriates property by authorizing a private citizen to take possession or control of another's private property. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

The Takings Clause is often understood as operating through two distinct doctrines. *See, e.g., Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). First, it provides an absolute prohibition against uncompensated *per se* takings, which are defined as occurring whenever there is a government-authorized, permanent physical occupation of private property.[3] Central to this doctrine is the principle that if the government overrides a property owner's right to exclude others from his property, it has effected a taking, regardless of the level of economic harm suffered by the private party. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). A second category of takings is described as "regulatory takings," which are defined according to a balancing test used to

[3] Of more recent vintage is a second category of *per se* takings. "When the owner of real property has been called upon to sacrifice all economically beneficial use in the name of the common good, that is, to leave

determine when a government regulation goes "too far" in burdening a property owner so that "justice and fairness" requires payment of just compensation. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Because determination of a regulatory taking involves a balancing test and a subjective determination, its focus is different from that of a *per se* taking, relying heavily on the extent of economic harm suffered by the property owner, the interference with investment backed expectations, and the importance of the government interest at stake. *See, e.g., Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986).

Several of the proposed rules contained in the NPRM would, if promulgated, result in unauthorized takings of the private property of building owners in violation of the Fifth Amendment. Because these proposals require building owners to acquiesce to the physical presence on their premises of uninvited telecommunications providers, they fall squarely within the *per se* takings rule as articulated by the Supreme Court in *Loretto*. Moreover, even if analyzed under the different standards of a regulatory taking, these proposals unfairly transfer substantial economic value from building owners to investors in telecommunications businesses, and thereby unreasonably interfere with the investment backed expectations of the real estate industry.

In sum, the NPRM fails to appreciate that the value of the assets owned by the real estate industry includes as a major component the ability of building

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his property economically idle, he has suffered a taking." *Lucas v. South Carolina Coastal Council*, 505

owners to manage, and thereby better facilitate, the delivery of a range of services—including telecommunications services—to their customers. In so doing, the NPRM proposes not only to authorize the physical occupation of building owners' property, but also to appropriate assets of substantial economic value to the property owners and to transfer them free of charge to telecommunications companies. Absent this governmental action, these companies would have to pay for these various assets, including access to private property.

(A) The Supreme Court's Decision in *Loretto* Demonstrates The Constitution's Absolute Protection Against A Requirement That Building Owners Provide Uncompensated Access To Their Property By Telecommunications Carriers

In its effort to promote "facilities-based competition,"[4] the NPRM proposes a number of rules that would require telecommunications carriers to be given forced access to facilities that are either owned by building owners or ceded by them to specific carriers—and not to the public at large.[5] In doing so, the NPRM implicates over a century of well-established Supreme Court precedent, culminating in *Loretto*, that applies the Takings Clause to any forced expansion of the nation's telecommunications' network, however small, onto or into privately owned property.

U.S. 1003, 1019 (emphasis added); *see also Agins v. Tiburon*, 447 U.S. 255, 260 (1980).
[4] *E.g.*, NPRM, ¶ 1.
[5] *See* NPRM ¶¶ 36-48, 52-63, 69.

In *Loretto*, the Supreme Court held that a New York statute authorizing a cable television company to place cable equipment onto Ms. Loretto's building constituted a taking under the Fifth Amendment. The decision rested upon the following basic principle:

> [W]e have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause. Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, "the character of the government action" not only is an important factor in resolving whether the action works a taking but also is determinative. *Loretto*, 458 U.S. at 426.

Thus, no balancing test is required where a Government act authorizes a physical occupation of private property. In reaching this conclusion, the Court emphasized that a physical occupation of another's property "is perhaps the most serious form of invasion of an owner's property interests." *Id.* at 435. In discussing the long line of authority that supports the view that "physical intrusions" are property restrictions of "an unusually serious character," the Court paid special attention to the importance of protecting a landowner's "right to exclude." *Id.* at 426. In two places in the opinion, the Court reiterated that "[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights," or "'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *See Id.* at 433, 435 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)). The decision therefore leaves no doubt that a property owner is

constitutionally entitled to the right to exclude others from his property, no matter what may be the reasons for, or the degree of, the potential invasion.

It is therefore well established in constitutional jurisprudence that the expansion of the country's telecommunications infrastructure implicates the Takings Clause. Indeed, it has long been held by the Supreme Court, and followed elsewhere as the law of the land, that any rule requiring a land owner to acquiesce to the presence of a telecommunications carrier on his private property constitutes a taking of property under the Fifth Amendment. *See Western Union Telegraph Co. v. Pennsylvania R. R. Co.*, 195 U.S. 540 (1904); *St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92 (1893); *Bell Atlantic v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994); *GTE Northwest v. Public Util. Comm'n*, 900 P.2d 495 (Or. 1995). The significance of *Loretto* was to make clear that this result in no way depends on the balancing tests applied in other areas of takings law, and also that "constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied." *Loretto*, 458 U.S. at 436 (emphasis added).

Demonstrating that the size or degree of the physical occupation is of no moment, the Court noted its favorable earlier citation of a decision to the effect that the existence of a single wire stretching over private property—and never touching it—would constitute a taking. *See Loretto*, 458 U.S. at 436, n. 13 (referring to *United States v. Causby*, 328 U.S. 256 (1946) and its approving citation

of *Butler v. Frontier Telephone Co.*, 186 N.Y. 486 (1906)). Indeed, in *Loretto* itself, the Supreme Court found that a taking occurred even though the total area occupied was less than two cubic feet, and stated that "whether the installation is a taking does not depend on whether the volume of space it occupies is bigger than a breadbox." *Loretto,* 458 U.S. at 438, n.16. In short, the *Loretto* rule cannot be avoided by arguing that the physical intrusion is too small or insignificant to matter.

The proposals contained in the NPRM require real property owners to acquiesce to the physical presence of uninvited telecommunications service providers onto their property. As the NPRM observes, "In order to serve customers in multiple tenant environments, telecommunications carriers typically require a means of transporting signals across facilities located within the building or on the landowner's premises to individual units." NPRM, ¶ 30 (emphasis added). These facilities consist of, among other things, poles, ducts, conduits, in-building wiring, rights of way, and rooftops. *See, e.g.* NPRM, ¶ 28, 36, 44. The NPRM's proposals have as their overarching objective the requirement that such facilities be made fully available to any and all telecommunications carriers so that carriers not previously able to use these facilities will have an unfettered right to do so. To the extent building owners have ownership, under state and local property law, of any of the facilities subject to one of the NPRM's proposed rules, the NPRM plainly effects a *per se*

taking of the property of those building owners in accordance with the direct holding in *Loretto*.

The Commission might seek to distinguish *Loretto* from the rules suggested in the NPRM by taking the position that a "nondiscrimination" requirement is somehow different from a "forced access" requirement. The thrust of this argument must be that a property owner loses his right to the *per se* protections of the Takings Clause as soon as he cedes some portion of his property to an outside party. *See In The Matter of Implementation of Section 207 of the Telecommunications Act of 1996*, at ¶ 21. ("*OTARD Ruling*"). Under this theory, a nondiscrimination requirement should be analyzed not under the authority of *Loretto* but rather under the multi-factor balancing test applied to regulatory takings. This understanding of the Takings Clause is not supportable, however, because under state property law, which is the baseline for any Takings Clause analysis, building owners are clearly authorized to grant limited rights of use and access to tenants or communications carriers. The existence of such limited grants under local property law forecloses the possibility of asserting that, as a matter of constitutional law, access to one party may be understood as access to all similarly situated parties.

(1) The Property Rights Of Each Building Owner Must Be Defined Under Applicable State And Local Property Law, Not Under General Principles Identified By The Commission

In determining whether the interests of a litigant meet the definition of "property" so as to warrant the protections of the Takings Clause, the Supreme Court has repeatedly emphasized that takings law is not itself the source of this determination. Rather, courts must look to the traditional sources of property law for guidance as to what constitutes private property. For instance, the Supreme Court's decision in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), relied on the following basic axiom:

> [W]e are mindful of the basic axiom that "'[property] interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'"

Id. at 1001, citing *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 *(1980), quoting Board of Regents v. Roth*, 408 U.S. 564 (1972).

The full significance of this central precept is that the application of the Takings Clause always requires an inquiry into (or an assumption of) the nature of the underlying property rights as defined under the relevant "independent source," usually state and local property law. Thus, applying the Fifth Amendment to the disclosure of a trade secret required the Court to assess the significance of Missouri law's recognition of trade secrets, as defined under the Restatement of Torts, as property. *Monsanto*, 467 U.S. at 1001-1004. Indeed, this principle is consistent with basic federalism principles reflected in the Constitution. Essentially, those principles reflect the Founders' understanding that the States are the primary source of property rights and that the Federal

Government is limited by the Constitution in the manner in which it is permitted to restrict or abrogate those rights. Among those limits are the requirement that if property rights are taken within the meaning of the Takings Clause, then just compensation must be paid.

Especially in the case of real property, where the definition of property rights are derived from local statute and common law, the Supreme Court has recognized the importance of local laws in determining when a land-use regulation constitutes a taking. In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Court stated:

> In light of our traditional resort to "existing rules or understandings that stem from an independent source such as state law" to define the range of interests that qualify for protection as "property" under the Fifth and Fourteenth Amendments . . . this recognition that the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by those "existing rules or understandings" is surely unexceptional. When, however, a regulation that declares "off-limits" all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.

Id. at 1030 (citations omitted).

In considering whether the Takings Clause applied to a total prohibition on construction on beachfront property, the Supreme Court in *Lucas* rejected any notion that the public benefit of a regulation could be "the basis for departing from our categorical rule that total regulatory takings must be compensated." *Id.* at 1026. Instead, the Court reasoned that this categorical rule could be avoided

only if "the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Id.* at 1027 (emphasis added). Thus, the "property" that is protected by the Takings Clause is defined in terms of "existing rules or understandings . . . . such as state law," rather than according to some abstract concept developed under either the Takings Clause or the property restriction itself. *See, e.g., Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972).

In analyzing whether or not the NPRM's proposed rules might lead to the "permanent physical occupation" of the "property" of certain building owners, it is therefore necessary to determine the scope of the building owners' property rights. Specifically, if a building owner has agreed to allow one telecommunications carrier to have access to his building through certain conduits, ducts, and rights of way, has he retained the right to exclude others from those same facilities, or has he irrevocably ceded that right of access to other carriers? Under the accepted rule described in *Board of Regents, Monsanto,* and *Lucas*, the question of what rights the building owner has retained must be answered by reference to the terms of the actual agreements he previously made with the carriers to whom he provided access, as those agreements are understood against the "logically antecedent inquiry into the nature of the owner's estate." *Lucas*, 505 U.S. at 1027.